

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHIPPY MAXWELL,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-06-2489
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner's application for writ of habeas corpus has been referred to this magistrate judge for report and recommendation (Dkt. 7). Respondent has filed a motion to dismiss (Dkt. 20), to which petitioner has not responded. The court recommends that the petition be denied as time-barred.

BACKGROUND

Petitioner Maxwell was convicted by a jury on December 6, 2002 of aggravated robbery and, based on an enhancement due to a prior conviction for assault with a deadly weapon, was sentenced to 25 years in prison. Maxwell appealed, and his conviction was affirmed on August 12, 2004. After being granted an extension of time until November 12, 2004 to file a petition for discretionary review, he did not do so.

Maxwell filed his first state court application for writ of habeas corpus on November 14, 2005. That application, WR-63,806-01, was dismissed on January 18, 2006 for noncompliance with Texas appellate rule § 11.07. He refiled his writ application, WR-63,806-02, on February 16, 2006, and it was denied without written order on July 12, 2006.

Maxwell filed this federal petition for writ of habeas corpus on July 21, 2006,¹ alleging ineffective assistance of counsel, prosecutorial and judicial misconduct, insufficiency of evidence, trial court error for failing to declare a mistrial, and abuse of discretion by the appellate court for failing to hold an evidentiary hearing on his state habeas application.

ANALYSIS

Maxwell's federal application is governed by the amendments to the federal habeas corpus statutes contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254.

The AEDPA provides as follows:

- (d)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

¹ The district court received and docketed the application on July 26, 2006. The court treats a *pro se* prisoner's petition as filed on the date he deposits it in the prison mail system for purposes of the AEDPA's statute of limitations. *Fisher v. Johnson*, 174 F.3d 710, 712 n.8 (5th Cir. 1999). Maxwell declares on his petition that he placed the petition in the prison mail on July 21, 2006.

- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Because Maxwell did not file a petition for discretionary review, his conviction became final on November 12, 2004, when his deadline for filing a petition for discretionary review expired. Under § 2244(d)(1)(A), Maxwell's federal limitation period expired on November 12, 2005.

Because he filed his first state court writ application on November 14, 2005, after the federal period had already expired, § 2244(d)(2) does not extend the one year period established by § 2244(d)(1)(A). *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Even if timely, that application would not toll the AEDPA's limitation period because it was dismissed for failure to comply with state procedural rules and therefore was not properly filed. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000); *Villegas v. Johnson*, 184 F.3d 467, 469-70 and n.2 (5th Cir. 1999). Maxwell filed his second state writ application on February 15, 2006, more than 15 months late. No other tolling provision of § 2244(d) applies in this case.

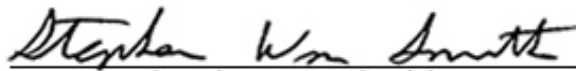
CONCLUSION

The court recommends that Maxwell's application for writ of habeas corpus be denied with prejudice.

The court further finds that Maxwell has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on May 17 , 2007.



Stephen Wm Smith
United States Magistrate Judge